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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11 NEO4J, INC., a Delaware corporation, and
12 NEO4J SWEDEN AB, a Swedish corporation

13 Plaintiffs,

14 vs.

15 GRAPH FOUNDATION, INC., an Ohio
corporation, GRAPHGRID, INC., and
16 ATOMRAIN INC., a Nevada corporation,

17 Defendants.
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Case No. 5:19-CV-06226-EJD

**GRAPH FOUNDATION, INC.'S NOTICE
OF MOTION AND MOTION TO DISMISS
THE FIFTH, SIXTH, AND SEVENTH
CAUSES OF ACTION OF THE FIRST
AMENDED COMPLAINT AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: October 29, 2020

Time: 9:00 a.m.

Place: Courtroom 4, 5th Floor

Judge: Hon. Edward J. Davila

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NOTICE OF MOTION AND MOTION TO DISMISS

PLEASE TAKE NOTICE THAT on October 29, 2020 at 9:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Judge Edward J. Davila in the United States District Court for the Northern District of California, Courtroom 4, located at the 5th Floor of the San Jose Courthouse, at 280 South 1st Street, San Jose, CA 95113, Defendant Graph Foundation, Inc. (“GFI”) will and hereby does move the Court to dismiss the Fifth Cause of Action for Unauthorized Distribution of Altered Copyright Management Information, the Sixth Cause of Action for Breach of License Agreement, and the Seventh Cause of Action for Unfair Competition of Plaintiffs’ First Amended Complaint (“Amended Complaint” or “AC”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This motion is brought on the grounds that the Fifth, Sixth, and Seventh Causes of Action of the Amended Complaint fail to state a claim upon which relief may be granted.

This motion is based upon this notice of motion and motion, the attached memorandum of points and authorities, the Declaration of John D. Pernick and Request for Judicial Notice filed herewith, the pleadings and papers filed herein, and such argument made and evidence introduced at the hearing on this motion. GFI also joins in the Motion to Dismiss filed by Defendants AtomRain, Inc. and GraphGrid, Inc. and incorporates the arguments made in that Motion to Dismiss into this Motion.

Dated: August 21, 2020

BERGESON, LLP

By: /s/ John D. Pernick
John D. Pernick

Attorneys for Defendant
GRAPH FOUNDATION, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Graph Foundation, Inc. (“GFI”) distributes the graph database software program ONgDB as open source software under one of the standard open sources software licenses, the GNU Affero General Public License, version 3 (“AGPLv3”) license. ONgDB is a fork of the open source graph database software program, “Neo4j” that is distributed by Plaintiff Neo4J Sweden AB (“Neo4J Sweden”). Neo4J, Inc. (“Neo4J USA”) originally brought this action against GFI alleging that certain actions GFI has taken in connection with its distribution of ONgDB infringe on the “Neo4j” trademark. Now, Plaintiffs have filed the Amended Complaint which adds Neo4J Sweden as a plaintiff and alleges new claims that attempt to enforce improper restrictions that Neo4J Sweden placed on the AGPLv3 open source license for the Neo4j software and that attempt to attack GFI’s status as a nonprofit.

All these new claims fail. The AGPLv3 license used by Neo4J Sweden in its open source distribution of the Neo4j software prohibits the addition of language adding “further restrictions” and allows any licensee that receives software under an AGPLv3 license with such additional prohibited language to remove that language from the software. In violation of the AGPLv3 license’s provisions, Neo4J Sweden added additional language, which it calls a “Commons Clause”, to the AGPLv3 license. According to the Amended Complaint, this additional language was removed from the copied source code files of the open source Neo4j software that are included in versions of ONgDB distributed by GFI. Neo4J Sweden claims that the distribution of open source Neo4j software without this added language is a breach of its license agreement. But, as the license agreement itself both prohibits the addition of further restrictions such as the Commons Clause and expressly permits a licensee to remove such prohibited additional language, the removal of these improperly added further restrictions cannot be a breach of the license agreement. Therefore, Neo4J Sweden’s Sixth Cause of Action for Breach of License Agreement fails.

1 Plaintiffs also attempt to turn the distribution of the Neo4j software with these improperly
2 added further restrictions removed into a violation of Section 1202(b) of the Digital Millennium
3 Copyright Act (the “DMCA”). But Section 1202(b) only prohibits the distribution of material
4 with such “copyright management information” removed if the person doing the distribution
5 **knows** that the information was removed “without the authority of the copyright owner or the law”
6 and also knows that distribution of the software without that information would aid copyright
7 infringement. 17 U.S.C. § 1202(b)(3). Here, the very license under which the software was
8 distributed expressly permits the removal of the language at issue. The AGPLv3 license copyright
9 is held by the Free Software Foundation, Inc. and the license to use the AGPLv3 provides:
10 “Everyone is permitted to copy and distribute verbatim copies of this license document, but
11 changing it is not allowed.” AGPLv3 license, p. 9. The language of the AGPLv3 license itself
12 also prohibits the addition of these further restrictions and permits licensees to remove improperly
13 added language. Neo4J Sweden has violated Free Software Foundation’s copyright and the terms
14 of the license by changing the language of the AGPLv3 license. The alleged removal of the
15 language improperly added by Neo4J Sweden is therefore in full compliance with the AGPLv3
16 license’s copyright and license terms. Moreover, Neo4j Sweden is identified as the copyright
17 holder for the Neo4j software in other documentation that is on the same webpages as the license
18 language about which Plaintiffs complaint. Consequently, Plaintiffs cannot establish that GFI
19 knew that the Commons Clause and other further restrictions were removed without the
20 authorization of the copyright holder or the law or that GFI knew that distribution of the open
21 source Neo4j software without those improperly added license terms would aid copyright
22 infringement.

23 Separately, Plaintiffs attempt to state a claim under California Business & Professions
24 Code section 17200 based on the allegation that GFI is falsely describing itself as a nonprofit
25 because, according to Plaintiffs, GFI does not operate exclusively for exempt purposes. But GFI
26 has been given 501(c)(3) non-profit status by the IRS. Therefore, its statements that it is a
27 501(c)(3) nonprofit are true. There is no private right of action under the Internal Revenue Code
28

1 that would give Plaintiffs standing to attack GFI's nonprofit status in this proceeding. Further,
 2 although Plaintiffs claim that GFI's statements regarding its nonprofit status are a fraudulent
 3 business practice, Plaintiffs do not allege that they relied on any such representation by GFI.
 4 Therefore, Plaintiffs have not alleged the necessary element of reliance. And, Plaintiffs have also
 5 failed to allege the circumstances of the alleged fraud with the particularity required under Rule
 6 9(b) of the Rules of Civil Procedure.

7 Each of the new claims alleged in the Amended Complaint fails as a matter of law. The
 8 Breach of License and DMCA claims fail under the language of the very license on which they are
 9 based. The Section 17200 claim fails because there is no fraud or unfair practice alleged in the
 10 Amended Complaint. The Fifth, Sixth and Seventh Causes of Action of the Amended Complaint
 11 should be dismissed.

12 **II. STATEMENT OF FACTS**

13 **A. Neo4j Software Distribution and Creation of the Neo4j Sweden Software** 14 **License.**

15 Neo4j software is a graph database software program. AC, ¶ 2. Plaintiffs have distributed
 16 Neo4j software under a variety of edition names through a variety of distribution methods. *Id.*, ¶¶
 17 30-33.

18 One-way Plaintiff Neo4J Sweden distributes Neo4j software is through open source
 19 software distribution platforms such as GitHub. *Id.*, ¶¶ 30-31. When software is distributed as
 20 open source software, it is typically done under one of a few standard open source software
 21 licenses. *Id.*

22 Prior to November 2018, Plaintiff Neo4J Sweden offered the NEO4J Community Edition
 23 software as open source software under one of these standard open source licenses, the GNU
 24 General Public License version 3 ("GPLv3") license. *Id.*, ¶ 30. Neo4J Sweden also licenses
 25 Neo4j software as open source under the AGPLv3 license. *Id.*, ¶ 31. Plaintiff Neo4J USA also
 26 offered NEO4J Enterprise Edition software ("NEO4J EE") under a paid-for commercial license.
 27 *Id.*, ¶ 30.

1 The AGPLv3 license, which is referred to in the Amended Complaint but is not attached,
 2 states its purpose as “to guarantee your freedom to share and change all versions of a program--to
 3 make sure it remains free software for all of its users.”¹ AGPLv3 license, Preamble. The
 4 AGPLv3 license contains a copyright notice from its copyright holder, the Free Software
 5 Foundation, stating that “[e]veryone is permitted to copy and distribute verbatim copies of this
 6 license document, **but changing it is not allowed.**” *Id.*, p. 1 (emphasis added). Consistent with
 7 that purpose and that restriction, the AGPLv3 license contains specific provisions preventing those
 8 who issue software on open source platforms under the AGPLv3 license from changing the
 9 language of the license in a way that limits that freedom.

10 In particular, Section 7 of the AGPLv3 license prohibits licensors from adding additional
 11 restrictions to the AGPLv3 license beyond those set out in the AGPLv3 license itself. *Id.*, Section
 12 7. Under Section 7 of the AGPLv3 license, a licensor can add certain additional provisions such
 13 as a disclaimer of warranty, limitations on trademark use, and indemnity provision. *Id.* But
 14 Section 7 of the AGPLv3 states that any other additional terms are considered “further
 15 restrictions” and may be removed by the recipient of the software. “If the Program as you
 16 received it, or any part of it, contains a notice stating that it is governed by this License along with
 17 a term that is a further restriction, you may remove that term.” *Id.* Section 10 of the AGPLv3
 18 license further provides that the licensor “may not impose any further restrictions on the exercise
 19 of the rights granted under this License . . .” *Id.*, Section 10.

20 In May 2018, Plaintiff Neo4J Sweden released NEO4J EE version 3.4. AC, ¶ 32. Plaintiff
 21 Neo4J Sweden did offer the NEO4J EE version 3.4 on GitHub, the preeminent open source
 22 software repository. *Id.* However, although Neo4J Sweden used the AGPLv3 license and Neo4J
 23 Sweden added language of its own to the language of AGPLv3, which Plaintiffs describe as a
 24 “Commons Clause”. *Id.* In the Amended Complaint, Plaintiffs refer to this AGPLv3 license with
 25 the Commons Clause as the “Neo4j Sweden Software License”. *Id.* Plaintiffs do not attach a

26 ¹ A copy of the AGPLv3 license is attached as Exhibit 1 to the Declaration of John D. Pernick
 27 (“Pernick Declaration.”).

1 copy of this Neo4j Sweden Software License to the Amended Complaint so a copy of it is
2 provided in these papers as Exhibit 2 to the Pernick Declaration.

3 The Neo4j Sweden Software License then recites all of the language from the AGPLv3
4 license, including Section 3's prohibition on bringing claims under anti-circumvention laws,
5 Section 7's language allowing licensees to remove further restrictions and Section 10's prohibition
6 on imposing further restrictions. Neo4j Sweden Software License, Sections 3, 7, 10. But, the
7 Neo4j Sweden Software License also contains additional language, added by Neo4J Sweden, that
8 contains further restrictions.

9 The Neo4j Sweden Software License states "The software ("Software") is developed and
10 owned by Neo4j Sweden AB (referred to in this notice as "Neo4j") and is subject to the terms of
11 the GNU Affero General Public License Version 3, with the Commons Clause as follows".
12 Neo4j Sweden Software License, p. 1. Then, at the very end of the Neo4j Sweden Software
13 License, after reciting all of the provisions of the AGPLv3 license, the further restriction of the
14 Commons Clause is added, which states:

15 "Commons Clause" License Condition

16 The Software is provided to you by the Licensor under the License, as defined
17 below, subject to the following conditions. Without limiting other conditions in the
18 License, the grant of rights under the License will not include, and the License does
19 not grant to you, the right to Sell the Software. For purposes of the foregoing,
20 "Sell" means practicing any or all rights granted to you under the License to provide
entirely or substantially, of the Software or the functionality of the Software. Any
license notice or attribution required by the License must also include this
Commons Clause License Condition notice.

21 *Id.*, pp. 15-16. Thus, despite the express language in the AGPLv3 license, which is incorporated
22 into the Neo4j Sweden Software License, that no further restriction can be added to the AGPLv3
23 license, Neo4J Sweden added the further restriction of the Commons Clause to the AGPLv3
24 license and then made Neo4J EE version 3.4 available on open source software platforms under
25 that Neo4j Sweden Software License.

B. ONgDB and the Removal of the Commons Clause.

GFI was formed in June 2018 as an Ohio non-profit corporation. AC, ¶¶ 5, 35. The purposes of GFI is to license, under AGPLv3, a free and open source alternative to proprietary native graph offerings such as the commercial version of NEO4J EE. GFI's open source alternative is called ONgDB. *Id.*, ¶ 36.

The Amended Complaint alleges that John Mark Suhy copied Neo4J EE source code files, with their associated copies of the Neo4j Sweden Software License into GFI's ONgDB repository on the GitHub open source website. *Id.*, ¶ 67. According to Plaintiffs, Mr. Suhy, in connection with that alleged copying, removed the Commons Clause and other language that Neo4j Sweden had added to the AGPLv3 license in the Neo4j Sweden Software License, so that the license language on the copied files matched the AGPLv3 license language with no further restriction language. *Id.*

Specifically, in paragraph 68 of the Amended Complaint, Plaintiffs allege that the following language, in addition to the Common Clause provision was removed from the LICENSE.txt file for the enterprise/neo4j-enterprise source code:

NOTICE

This package contains software licensed under different licenses, please refer to the NOTICE.txt file for further information and LICENSES.txt file for full license texts.

Neo4j Enterprise object code can be licensed independently from the source code under separate commercial terms. Email inquiries can be directed to: licensing@neo4j.com. More information is also available at: <https://neo4j.com/licensing/>

The software ("Software") is developed and owned by Neo4j Sweden AB (referred to in this notice as "Neo4j") and is subject to the terms of the GNU AFFERO GENERAL PUBLIC LICENSE, Version 3, with the Commons Clause as follows:

Id., at ¶ 68.

The Amended Complaint alleges that after the open source version of NEO4J EE was copied by Mr. Suhy and the Commons Clause and other further restrictions removed from the license language associated with the source code files, and the resulting software placed on GFI's ONgDB GitHub repository, those software files were distributed from that repository. *Id.*, ¶ 70.

1 But the Amended Complaint ignores the fact that along with the LICENSE.txt file from
 2 which that language is removed, the ONgDB GitHub repository for each of these software files
 3 also holds a NOTICE.txt file. For example, on the very same page for the enterprise/neo4j-
 4 enterprise source code files holding the LICENSE.txt file referenced in the Amended Complaint,
 5 there is a NOTICE.txt file. A copy of the contents page for the enterprise/neo4j-enterprise source
 6 code files where the LICENSE.txt file referenced in Paragraph 68 of the Amended Complaint is
 7 located on GFI's ONgDB GitHub page is attached to the Pernick Declaration as Exhibit 3.² That
 8 page lists the NOTICE.txt along with the LICENSE.txt file referenced in the Amended Complaint.
 9 The NOTICE.txt from the enterprise/neo4j-enterprise contents page contains the following
 10 language:

11 Copyright © 2002-2018 Neo4j Sweden AB (referred to in this notice as “Neo4j”)
 12 [<http://neo4j.com>]

13 This product includes software (“Software”) developed and owned by Neo4j

14 The Software is subject to the terms of the GNU AFFERO GENERAL PUBLIC
 15 LICENSE Version 3 (<http://www.fsf.org/licenses/licenses/agpl-3.0.html>),
 included in the LICENSE.txt file, with the Commons Clause

16 Neo4j Enterprise object code can be licensed independently from the source under
 17 separate commercial terms. Email inquiries can be directed to:
licensing@neo4j.com. More information is also available at:
<https://neo4j.com/licensing/>

18 Pernick Decl., Exh.21. So, other than the Commons Clause language itself, all of the language
 19 removed from the Neo4j Sweden Software License from the LICENSE.txt file for the
 20 enterprise/neo4j-enterprise source code is included in the NOTICE.txt file for the enterprise/neo4j-
 21 enterprise source code files Mr. Suhy allegedly copied from NEO4J EE along with the copyright
 22 attribution language.

23 The Amended Complaint goes on to allege that Mr. Suhy made “virtually identical”
 24 changes to the other 27 files. AC, ¶ 68. But, accompanying each of the edited LICENSE.txt files
 25 that Plaintiffs attach as Exhibit 36 to the Amended Complaint is a NOTICE.txt file containing the

26 ² As set out in the Request for Judicial Notice, as the pages and NOTICE.txt files attached to the
 27 Pernick Declaration currently exist on the internet, are not subject to reasonable dispute, and are
 28 from the same exact source as the pages attached as Exhibit 36 to the Amended Complaint, the
 contents of these documents are proper subjects of judicial notice.

1 same language as is in the NOTICE.txt file for the enterprise/neo4j-enterprise source code.
 2 Exhibits 4 through 30 of the Pernick Declaration show the NOTICE.txt files for each of the other
 3 25 source code files that are referenced in Exhibit 36 to the Amended Complaint.³ So, other than
 4 the Commons Clause language itself, all of the language removed from the Neo4j Sweden
 5 Software License from the LICENSE.txt file is included in the NOTICES.txt file for each of the
 6 source code files copied from NEO4J EE along with the copyright attribution language.

7 C. Procedural History.

8 Neo4j USA originally brought this action as a trademark infringement action on October 1,
 9 2019. Then, on July 16, 2020, pursuant to the stipulation of the parties, Plaintiffs filed the
 10 Amended Complaint adding Neo4j Sweden as a plaintiff and adding the Fifth, Sixth, and Seventh
 11 causes of action. In the Fifth Cause of Action, Plaintiffs allege that GFI's distribution of the
 12 Neo4j software after Mr. Suhy's removal of the Commons Clause and other further restrictions
 13 from the Neo4j Sweden Software License distributed with copies of NEO4J EE software source
 14 files is a violation of the DMCA. Neo4J Sweden alleges in the Sixth Cause of Action that the
 15 removal of the Common Clause language from the Neo4j Sweden Software License is a breach of
 16 that license. Finally, in the Seventh Cause of Action, Plaintiffs allege that GFI is not operating in
 17 accordance with its non-profit status and claim that, therefore, GFI's description of itself as a non-
 18 profit is a fraudulent business practice that deceived customers and prospective customers and,
 19 based on that allegation, alleges that GFI has violated California Business & Professions Code
 20 Section 17200. As is set out below, none of these claims has merit.

21
 22 ³ The Amended Complaint references 28 source code files as being copied and changed. But
 23 Exhibit 36 contains LICENSE.txt files for only 26 source code files. The other LICENSE.txt files
 24 included in Exhibit 36 are (a) the LICENSE.txt file containing the language of the AGPLv3
 25 license that is on the opening contents page of ONgDB 3.5.9. There are no changes shown in the
 26 text of that LICENSE.txt file (See, AC, Exh. 36, pp. 1-11) and (b) the LICENSE.txt file that is in
 27 the folder "packaging" that contains the subfolder with the "packaging/standalone" source code
 28 files. See, AC, Exh. 36, pp. 337-350. The "packaging" contents page, which shows the
 "packaging/standalone" subfolder, is attached as Exhibit 31 to the Pernick Declaration. The
 contents page for the "packaging/standalone" subfolder of the "packaging" contents page is
 attached to the Pernick Declaration as Exhibit 32. The NOTICE.txt file for the
 "packaging/standalone" source code that contains the copyright attribution is attached as Exhibit
 28 to the Pernick Declaration.

III. ARGUMENT

A. The Standard on a Motion to Dismiss.

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to “give the defendant fair notice of what the... claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although particular detail is not generally necessary, the factual allegations “must be enough to raise a right to relief above the speculative level” such that the claim “is plausible on its face.” *Id.* at 556-557. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Dismissal of a claim under Rule 12(b)(6) may be based on a “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988); *see Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

In deciding whether to grant a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, the Court accepts all material facts alleged as true and construes them in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). However, “the tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678–679. Indeed, “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotations omitted); *accord Iqbal*, 556 U.S. at 677–680.

Thus, conclusory allegations of law, unwarranted deductions of fact, and unreasonable inferences are insufficient to defeat a motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). The Court may also consider documents attached to the complaint, documents relied upon but not

1 attached to the complaint when authenticity is not contested, and matters of which the Court takes
 2 judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688–689 (9th Cir. 2001). And the Court
 3 need not accept as true allegations contradicted by judicially noticeable facts, or by exhibits
 4 attached to or incorporated in the pleading. *Sprewell*, 266 F.3d at 988.

5 Additionally, where fraud is asserted as a basis for relief, plaintiffs must set forth “must
 6 state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. Rule 9(b). Failure to
 7 satisfy Rule 9(b)’s requirements requires dismissal of the complaint. *Semegen v. Weidner*, 780
 8 F.2d 727, 731 (9th Cir. 1986). Every element of a fraud claim must be pled with particularity.
 9 *389 Orange Street Partners v. Arnold*, 179 F.3d 656, 663 n. 2 (9th Cir. 1999); *Moore v. Brewster*,
 10 96 F.3d 1240, 1245-46 (9th Cir. 1996). Pleading fraud with particularity requires plaintiffs to set
 11 forth “specific descriptions of the representations made, [and] the reasons for their falsity.” *Blake*
 12 *v. Dierdorff*, 856 F.2d 1365, 1369 (9th Cir. 1988); *Moore, supra*, 96 F.3d at 1245-46. “To allege
 13 fraud with particularity, a plaintiff must set forth...what is false or misleading about a statement
 14 and why it is false.” *In re Glenfed Securities Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994)
 15 (superseded by statute on other grounds); *see also, Yourish v. California Amplifier*, 191 F.3d 983,
 16 993 (9th Cir. 1999). It is insufficient for plaintiff to merely “set forth conclusory allegations of
 17 fraud . . . punctuated by a handful of neutral facts.” *Semegen, supra*, 780 F.2d at 731.

18 **B. Neo4J Sweden’s Breach of License Claim Fails Because the License Expressly**
 19 **Permits Removal of Further Restrictions Such as the Commons Clause**
 20 **Language.**

21 Neo4J Sweden’s Sixth Cause of Action for Breach of Contract admits that Neo4J Sweden
 22 granted GFI a license to use, copy and distribute the source code files that are subject to the terms
 23 of the Neo4j Sweden Software License. AC, ¶ 120. The Sixth Cause of Action then alleges that
 24 GFI breached the Neo4j Sweden Software License by removing the Commons Clause restriction
 25 and other further restrictions from the license accompanying those source code files. *Id.*, ¶¶ 122-
 126.

26 But the allegations of the Sixth Cause of Action ignore that, under the very terms of the
 27 AGPLv3 license used by Neo4j Sweden, Neo4J Sweden’s addition of the Commons Clause
 28

1 provision and other further restrictions are expressly prohibited. Under the AGPLv3 license
2 terms, GFI, and any other AGPLv3 licensee, is expressly permitted to remove those offending
3 provisions.

4 The Neo4j Sweden Software License states that the software is “subject to the terms of the
5 GNU AFFERO GENERAL PUBLIC LICENSE Version 3 . . .” but then purports to add the
6 restrictions of the Commons Clause. Neo4j Sweden Software License, p. 1. However, Section 10
7 of the AGPLv3 license, to which the Neo4j software is subject according to Neo4J Sweden itself,
8 states, unequivocally, that the licensor “may not impose any further restrictions on the exercise of
9 rights granted or affirmed under this license . . .” *Id.*, Section 10. And, Section 7 of the AGPLv3
10 explicitly grants the recipient of software issued under the AGPLv3 license with additional
11 restrictions added by the licensor permission to remove those restrictions. “If the Program as you
12 received it, or any part of it, contains a notice stating that it is governed by this License along with
13 a term that is a further restriction, you may remove that term.” AGPLv3, Section 7. These same
14 provisions are included, verbatim, in the Neo4j Sweden Software License. Neo4j Sweden
15 Software License, Sections 7, 10.⁴

16 Consequently, GFI has not breached any obligation that it has under the Neo4j Sweden
17 Software License because that license expressly permits GFI, or any licensee, to remove the
18 Commons Clause restriction and the other further restrictions improperly added by Neo4J Sweden.

19 Indeed, it is Neo4J Sweden that is in breach here. Contrary to Section 10 of the AGPLv3
20 license, under which Neo4J Sweden purports to license the software, Neo4J Sweden altered the
21 language of the license and added further restrictions. What Neo4J Sweden alleges as a breach is
22 actually GFI acting in accordance with the rights granted under the AGPLv3 license and the Neo4j
23 Sweden Software License to remove the further restrictions wrongfully added by Neo4j Sweden.
24 Therefore, Neo4J Sweden’s Sixth Cause of Action for Breach of Contract fails to state a claim
25 against GFI.

26 _____
27 ⁴ As is set out in the accompanying Request for Judicial Notice, the terms of the AGPLv3 license
28 and the Neo4j Sweden Software License are subject to judicial notice.

C. Plaintiffs' Claim Under the DMCA Fails Because the Terms of the AGPLv3 License Defeat.

Plaintiffs' Fifth Cause of Action alleges that GFI encouraged Mr. Suhy to remove the Commons Clause and other further restrictions language (which Plaintiffs claim is "copyright management information") from the NEO4J EE Software that was distributed under the Neo4j Sweden Software License and then distributed the source code files from which that language had been removed. AC, ¶¶ 115-116. Plaintiffs claim that these alleged acts are a violation of 17 U.S.C. § 1202(b). *Id.*

The Amended Complaint does not specify which subsection or subsections of 17 U.S.C. § 1202(b) Plaintiffs claim were violated. Section 1202(b) identifies three types of violation:

- (1) Intentional removal or alteration of copyright management information;
- (2) Distribution of copyright management information knowing that the copyright management information has been removed or altered without the authority of the copyright owner or the law; or
- (3) Distribution of a work or a copy of a work knowing that copyright management information has been removed or altered without the authority of the copyright owner or the law.

Further, to establish any of these violations, a plaintiff must also establish that the defendant took the action knowing or having reasonable grounds to know that the action will induce, enable, facilitate or conceal the infringement of a copyright holder's rights under the Copyright Act. 17 U.S.C. § 1202(b).

The Amended Complaint does not allege that GFI removed or altered any copyright management information. The Fifth Cause of Action, instead, alleges that GFI distributed Neo4j software with the Commons Clause and other further restrictions language removed, presumably attempting to allege a claim under Section 1202(b)(3) or perhaps Section 1202(b)(2). But, to establish a violation of Section 1202(b)(2) or (3), a plaintiff must show that the defendant *knew* that the copyright management information was removed *without the authority of the copyright owner or the law*. Here, the AGPLv3 license used by Neo4j Sweden expressly provides that a

1 licensee may remove further restrictions such as the Commons Clause and the other further
2 restrictions language that were improperly added by Neo4J Sweden. Given that, under the very
3 license agreement governing the open source code at issue, the alleged copyright management
4 information could be removed, and the copyright holder of the license requests it be rejected,
5 Plaintiffs' cannot establish that GFI knew that the Commons Clause and other further restrictions
6 language was removed without the authority of the copyright owner or the law. *See, e.g., Gordon*
7 *v. Nextel Communs*, 345 F. 3d 922, 926-927 (6th Cir. 2003) (granting defendants' motion for
8 summary judgment on claim under 17 U.S.C. § 1202(b)(3) where evidence showed defendants
9 believed that poster with copyright information removed had been cleared for use).

10 Additionally, to establish any violation of Section 1202(b), Plaintiffs must establish that
11 GFI acted with **knowledge** that its actions would **induce, enable, facilitate or conceal** the
12 infringement of a copyright holder's rights under the Copyright Act. 17 U.S.C. § 1202(b). To the
13 contrary, the addition of those further restrictions is expressly prohibited under the AGPLv3
14 license, the holder of the copyright to the AGPLv3 license and the removal of the Commons
15 Clause and other further restrictions is expressly permitted under the terms of the AGPLv3 license
16 used by Neo4j Sweden for the Neo4j Sweden Software License. How would Plaintiffs establish
17 that a contractually permitted action was taken with knowledge that it would aid infringement.
18 Moreover, as is set out above, the NOTICE.txt files that accompany each of the NEO4J EE source
19 code files at issue specifically identify Neo4j Sweden as the copyright holder and contain the non-
20 Commons Clause language that was removed from the Neo4j Sweden Software License. As GFI
21 is distributing this source code with copyright attribution to Neo4j Sweden, Plaintiffs cannot
22 establish that GFI acting with knowledge that its actions would aid copyright infringement. *See,*
23 *e.g., Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 673-675 (9th Cir. 2018) (to establish violation of
24 Section 1202(b) of DMCA, plaintiff must plead and prove that defendant acted knowing that
25 actions would aid copyright infringement).

26 Based on the allegations of the Amended Complaint and the facts subject to judicial notice
27 with respect to the materials distributed by GFI with the source code files at issue, Plaintiffs
28

cannot establish the necessary knowledge elements to prevail on a claim under Section 1202(b). The Fifth Cause of Action fails to state a claim under 17 U.S.C. § 1202(b) should be dismissed.

D. Plaintiffs' Section 17200 Claim Based On Alleged Misrepresentation of Non-Profit Status Fails.

Plaintiffs' Seventh Cause of Action alleges that GFI describes itself as a 501(c)(3) nonprofit. Plaintiffs concede that GFI been given 501(c)(3) nonprofit status by the IRS. AC, ¶ 5, Exh. 1. But they allege that they are "informed and believe" that GFI does not operate as required by 26 U.S.C. § 501(c)(3). *Id.*, ¶ 131. They then say that GFI promotes its "false altruistic purpose" to deceive third parties into contributing time and expertise toward the development of ONgDB. *Id.*, ¶¶ 132, 133. According to Plaintiffs, this alleged fraudulent scheme allows GFI and defendants GraphGrid and Atom Rain to unfairly compete with Neo4j USA and, according to Plaintiffs, is a violation of California Business Code section 17200's prohibition on unfair and fraudulent business practices. As is set out below, this Section 17200 claim set out in the Seventh Cause of Action fails for a host of reasons.

1. Plaintiffs Do Not Have a Private Right of Action to Challenge GFI's Tax-Exempt Status.

First, as is shown by Exhibit 1 to the Amended Complaint, GFI has been determined by the IRS to be a 501(c)(3) tax exempt organization. Therefore, there is nothing false or fraudulent about GFI describing itself as a 501(c)(3) non-profit. Given that GFI's statements as to its nonprofit status are true, that should dispose of the Seventh Cause of Action.

Moreover, even if Plaintiffs could base a claim on the theory that GFI's nonprofit status should be revoked, to prevail, Plaintiffs would have to obtain from this Court a determination that GFI should not be permitted to maintain its tax-exempt status. But the Internal Revenue Code expressly prohibits anyone from attempting to enforce any section of the Internal Revenue Code without the authorization of the Secretary of the Treasury and the United States Attorney General. The Internal Revenue Code provides that "no civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes . . . the

proceedings and the Attorney General . . . directs that the action be commenced.” 26 U.S.C. § 7401. Further, as multiple courts have held, there is no private right of action under section 501(c)(3) to enforce the requirements for obtaining or maintaining tax-exempt status. *See, e.g. Fields v. Banner Health*, No. CIV-04-1297-PHX-SRB, 2005 U.S. Dist. LEXIS 13481, at *11 (D. Az. March 23, 2005) (dismissing action from indigent patient claiming that hospital’s status as 501(c)(3) non-profit created obligation for hospital to provide treatment); *Turner v. Unification Church*, 473 F. Supp. 367, 377 (D. R.I. 1978) (“the legislative scheme of the Internal Revenue Code does not indicate that Congress intended to enforce these tax laws by providing civil causes of action or authorizing private attorneys general.”); *Washington v. Med. Ctr. of Cent. Ga., Inc.*, No. 5:04-cv-185, 2005 U.S. Dist. LEXIS 2614, at * 6 (M.D. Ga., Jan. 21, 2005) (“Plaintiffs’ . . . arguments in essence are an attempt by a private party to enforce its interpretation of the tax code as it relates to another private party. The Internal Revenue Code permits no such private right of action to enforce the provisions of Section 501(c)(3)”). Recently, in *Quigley v. Yelp, Inc.*, No. 17-cv-03771-RS, 2018 U.S. Dist. LEXIS 230967 (N.D. Cal. Jan. 22, 2018), Judge Richard Seeborg dismissed a claim brought by an individual against a 501(c)(3) nonprofit, Media Matters for America, which sought an order removing that entity’s non-profit status based on allegations that Media Matters engaged in partisan political activity based on the lack of a private right of action.

This claim fails because this statute does not provide for a private right of action. The Internal Revenue Code is administered and enforced by the Secretary of the Treasury “[e]xcept as otherwise expressly provided by law.” 26 U.S.C. § 7801(a)(1). No provision of the Code allows a private right of action to challenge determinations made under Section 501(c)(3) or to seek declaratory or injunctive relief under that section. *Id.*, at *9.

Judge Seeborg’s reasoning in the *Quigley* case applies equally here.

When a private right of action under a given statute is absolutely barred, a plaintiff cannot rely on that statute as the basis for a claim under Section 17200. *See, Zhang v. Superior Court*, 57 Cal. 4th 364, 384 (2013) (where legislature barred private actions under Unfair Insurance Practices Act, plaintiff cannot rely on alleged violations of the Act as a basis for a Section 17200 claim); *Newton v. Am. Debt. Servs.*, 75 F. Supp. 3d 1048, 1058 (N.D. Cal. 2014) (where private

1 enforcement of FDIC order is absolutely barred as a matter of federal law, plaintiff cannot use a
2 claim of violation of the order as the basis of a Section 17200 claim).

3 Congress has barred *anyone* from enforcing any provision of the Internal Revenue Code
4 without the authorization of the Secretary of the Treasury and the United States Attorney General.
5 Because Congress has barred Plaintiffs from pursuing a claim under 26 U.S.C. § 501(c)(3), they
6 cannot use the guise of a Section 17200 claim to create a private right of action attacking GFI's
7 tax-exempt status.

8 **2. Plaintiffs Have Not Alleged an Unfair Business Practice.**

9 Plaintiffs describe the Seventh Cause of Action as “Unfair and Fraudulent Business
10 Practices”. Plaintiffs do allege purportedly fraudulent actions based on their ill-fated challenge to
11 GFI's nonprofit status. But Plaintiffs do not specify how these alleged actions fall within the
12 category of “unfair” business practices. Under Section 17200, an “unfair” business practice is one
13 that threatens an incipient violation of an antitrust law, or violates the policy or spirit of such a law
14 because its effects are comparable to or the same as a violation of the law, or otherwise
15 significantly threatens or harms competition. *Cel-Tech Communications, Inc. v. Los Angeles*
16 *Cellular Telephone Co.*, 20 Cal. 4th 163, 186-187 (1999). Importantly, what must be alleged to
17 state a claim under the unfairness prong is injury to *competition* not just injury to a *competitor*.
18 *Id.* at 187 (emphasis added). *See also, AlterG, Inc. v. Boost Treadmills LLC*, 388 F. Supp. 3d
19 1133, 1155-1156 (N.D. Cal. 2019) (where complaint contains no allegation of violation of
20 antitrust law or effects comparable to violation of antitrust law, no unfair business practice is
21 alleged). Here, Plaintiffs, at most, allege that they have been injured by GFI's use of its nonprofit
22 status. No injury to competition is alleged. Therefore, Plaintiffs have not alleged a claim for an
23 “unfair” business practice.

24 **3. Plaintiffs Fail to Allege Reliance on any Allegedly Fraudulent** 25 **Statement.**

26 To state a claim under Section 17200 predicated on fraud, a plaintiff must allege that it
27 relied on the allegedly fraudulent statements. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310,
28

327 (2011). Consequently, when, a plaintiff alleges only that third-parties have relied on the allegedly fraudulent statements, and fails to allege its own reliance, the plaintiff has failed to allege the necessary reliance element of the Section 17200 claim. *See, e.g., 23andMe, Inc. v. Ancestry.com DNA, LLC*, 356 F. Supp. 3d 889, 911 (N.D. Cal. 2018) (dismissing 17200 claim brought by competitor based on alleged fraudulent statements relied on by customers, not the competitor); *A White & Yellow Cab, Inc. v. Uber Techs., Inc.*, No. 15-cv-05163-JSW, 2017 U.S. Dist. LEXIS 49803, at *20-21 (N.D. Cal. Mar. 31, 2017) (dismissing 17200 claim brought by cab company alleging that Uber made false statements to consumers about its safety practices and background checks); *AlterG, Inc.*, 388 F. Supp. 3d at 1156 (allegation that plaintiff was harmed because customers relied on defendant's representations but does not allege plaintiff itself relied on defendant's representations to its detriment, plaintiff does not have standing to pursue Section 17200 claim under the fraudulent prong).⁵

Here, Plaintiffs do not allege that they relied on any statement by GFI as to its nonprofit status or anything else. The only allegation in the Amended Complaint is that "customers and prospective customers have been confused and misled, deceived and mistaken as to the nature of Graph Foundation's business . . ." AC, ¶ 136. Because Plaintiffs fail to allege that they relied on any allegedly fraudulent statement by GFI, Plaintiffs do not have standing to pursue a Section 17200 claim under the fraudulent prong.

4. Plaintiffs Fail to Allege Any Representation with the Required Specificity.

Finally, Plaintiffs' allegations as to the alleged fraudulent scheme that is the basis of their Section 17200 claim do not meet the requirements of Rule 9(b) of the Federal Rules of Civil Procedure. The particularity requirements of Rule 9(b) apply to Section 17200 claims based on allegations of fraud. *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).

⁵ There are some cases that can be read as not requiring a competitor plaintiff to allege its own reliance to state a Section 17200 claim under the fraudulent prong. *See, Equinox Hotel Mgmt. v. Equinox Holdings, Inc.*, No. 17-cv-06393-YGR, 2018 U.S. Dist. LEXIS 16914, at *32-33 (N.D. Cal. Feb. 1, 2018) (discussing cases). However, as the court stated in *Equinox*, the majority approach requires that a plaintiff allege that it personally relied on the alleged misstatement. *Id.* at 32.

1 The Amended Complaint fails to allege the facts purporting to support Plaintiffs' claim
 2 under the fraudulent prong of Section 17200 with any specificity. Plaintiffs allege that GFI
 3 describes itself as a nonprofit with 501(c)(3) status on its website, but that statement is true.
 4 Moreover, Plaintiffs do not allege any facts relating to any person viewing that statement on the
 5 GFI website or taking any action in reliance on that statement. Plaintiffs then go on to state that
 6 "GFI openly solicits and accepts monetary and in-kind donations under the guises" that it is a
 7 501(c)(3) nonprofit, but Plaintiffs do not allege the facts relating to any specific solicitation or
 8 identify any person or entity, themselves or anyone else, that has made a donation in reliance on
 9 any such solicitation. AC, ¶ 130. Plaintiffs also allege, on information and belief, that GFI's
 10 nonprofit status has been used to "solicit and deceive third parties into contributing their time and
 11 expertise toward the development of ONgDB . . ." but, again, do not identify any specifics as to
 12 any such instance. AC, ¶ 132.

13 These non-specific allegations fail to meet the requirements of Rule 9(b). To meet those
 14 requirements, a complaint must allege the "who, what, when, where, and how of the misconduct
 15 charged . . ." *Kearns*, 567 F.3d at 1124 (internal quotation marks). Here, there are no specific
 16 allegations of Plaintiffs, or anyone else, seeing or hearing any statement with respect to GFI's
 17 nonprofit status and then, in reliance on that statement, taking any action. Plaintiffs' Section
 18 17200 claim fails for this reason as well.

19 **IV. CONCLUSION**

20 Neo4j Sweden used the AGPLv3 license to distribute NEO4J EE. The AGPLv3 expressly
 21 prohibits the addition of further restrictions such as the Common Clause and other language added
 22 to the license by Neo4J Sweden. The AGPLv3 license expressly permits licensee to removal of the
 23 Commons Clause and other further restrictions that were improperly added. Because the removal
 24 of this language is expressly permitted, there has been no breach of any license agreement and no
 25 violation of Section 1202(b) of the DMCA. And, because GFI is a 501(c)(3) nonprofit and
 26 Plaintiffs do not have standing to argue otherwise and have failed to allege any fraudulent or
 27 unfair business practice, the Amended Complaint fails to allege a violation of Section 17200.

1 Therefore, the Fifth, Sixth, and Seventh Causes of Action of the Amended Complaint should be
2 dismissed.

3
4 Dated: August 21, 2020

BERGESON, LLP

5
6 By: /s/ John D. Pernick
John D. Pernick

7 Attorneys for Defendant
8 GRAPH FOUNDATION, INC.
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